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No. 390

In the Supreme Court of the United States

OCTOBER TERM, 1961

WILLIE AMOS WIGGS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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In the Supreme Court of the United States

OCTOBER TERM, 1961

WILLIE AMOS WIGGS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner, Willie Amos Wiggs, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above entitled case on the 29th day of June, 1962; Petition for Re-hearing denied as of August 2, 1962.

CITATIONS TO OPINIONS BELOW

The District Court did not render an opinion as such, but rendered its judgment wherein the Petitioner was adjudged guilty under both counts of the Indictment which appear at pages 35 and 36 in the Transcript of Record ffled herein.

The judgment of the United States Court of Appeals for the Fifth Circuit is annexed hereto as an Appendix A-1.

The Opinion of the United States Court of Appeals for the Fifth Circuit is annexed hereto as an Appendix A-2.

The Order denying re-hearing is annexed hereto as an Appendix A-3.

JURISDICTION

The Judgment of the Circuit Court of Appeals was entered on June 29, 1962, Appendix A-1 hereto. Petition for Re-hearing was denied on August 2, 1962, Appendix A-3. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254 (1).

QUESTIONS PRESENTED FOR REVIEW

1. Whether the evidence upon which the Petitioner was convicted was obtained by unreasonable search and seizure by a Deputy Sheriff, a State Beverage Officer and an Officer

of the Alcohol and Tobacco Tax Division of the Internal Revenue Service under Articles IV and XIV of the Amendments to the Constitution of the United States when the Agents, without a search warrant, or probable cause, entered the premises, searched it, discovered the whiskey and then arrested the Petitioner.

2. Whether the United States District Court committed reversible error when it overruled the Motion to Suppress in which the legality of the search and seizure was challenged and also wherein Petitioner sought the name and identity of an Informer who allegedly gave information to the Officers that led to the search of the premises of Petitioner. This identity was also sought during the trial, (Tr.-21).

The Petitioner was not furnished with the name or identity of the confidential Informer and had no opportunity to cross examine, yet the alleged Informer's data was presented to the Court as second hand information as having been received from another Officer, Tr-12).

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STATUTES INVOLVED

COUNT I.

Section 5205 (a) 2, Internal Revenue Laws, Vol. 26, U.S.C.A., insofar as applicable provides as follows:

> . . . . "(2) Containers of other distilled spirits ---- No person shall transport, possess, buy, sell, or transfer any distilled spirits, unless the immediate container

thereof is stamped by a stamp evidencing the determination of the tax or indicating compliance with the provisions of this chapter" . . . .

and Section 5604 (a) (1), Internal Revenue Laws, Vol. 26, U.S.C.A., insofar as applicable provides as follows:

"(a) General. -- Any person who shall --

(1) transport, possess, buy, sell, or transfer any distilled spirits, required to be stamped under the provisions of section 5205 (a) (2), unless the immediate container thereof has affixed thereto a stamp as required by such section;" . . . .

. . . . " shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, for each such offense" . . . .

COUNT II.

Section 5601 (a) (12), Internal Revenue Laws, Vol. 26, U.S.C.A., insofar as applicable provides as follows:

"(12) Unlawful removal or concealment of distilled spirits. -- removes, other than as authorized by law, any distilled spirits on which the tax has not been paid or determined, from the place of manufacture or storage, or from any instrument of transportation, or conceals spirits so removed;" . . . .

AMENDMENTS TO UNITED STATES CONSTITUTION

ARTICLE IV:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized".

ARTICLE VI:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense".

ARTICLE XIV:

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities

of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws" . . .

STATEMENT.

Petitioner was charged in an Indictment returned in the United States District Court for the Northern District of Florida with unlawful possession of distilled spirits in containers upon which the immediate containers did not have stamps affixed and in the second count with unlawful concealment of distilled spirits. The cause was tried by agreement without a jury.

A Motion to Suppress, (Tr. 3), was filed in which it is charged the evidence was obtained by virtue of an unreasonable search and seizure and that Petitioner had been unable to obtain the identity of the alleged confidential Informer. Also, the Motion asserted the so called confidential Informer had not told the truth to the Officers, and that in fact no Informer existed and the claim of the Officers as to such is pure fiction. The issue of the existence of probable cause as a basis for a search, arrest and seizure was thusly raised prior to trial, (Tr. 3-5). The unreasonableness of the search, arrest, seizure and failure to furnish the identity of the alleged Informer, if such existed, was subsequently raised in the Motion for New Trial, (Tr. 33-35), and as to the Informer during trial, (Tr. 21).

An Agent of the Alcohol & Tobacco Tax Unit, over the physical resistance of the Petitioner, forced his way, (Tr. 17),

into the searched building. After the entry whiskey was observed, Petitioner was arrested and searched and a key was taken from his person. This key fit the lock to the building. The Officer stated Petitioner and another person prior to the arrest, were each carrying empty jugs, (Tr. 18-19). The Officer testified, (Tr. 20), that he did not have any information that whiskey was being unloaded, or that any illegal activity was going on, other than that which was given by the confidential Informer, (Tr. 20). Also, that all the Officer had to base his conclusion on that whiskey was being stored there was what some confidential Informer told him, (Tr. 20). The Officer particularly stated that he had not said the Informe was reliable, but that he was a confidential Informer, (Tr. 22), and had never given information on other violators and that he was a paid Informer, Tr. 23).

The search began by the forcible entry of the premises, the whiskey was observed and Petitioner was then arrested and searched, (Tr. 13-14).

One officer stated vaguely he had information apparently about unidentified whiskey from one week to ten days prior to the date of the alleged offense, (Tr. 24), but did not get a search warrant because of lack of probable cause and that the only other thing he observed subsequently as a basis for the search were two empty jugs in a public lane, (Tr. 26).

REASONS RELIED ON FOR ALLOWANCE OF WRIT

The Petitioner urges the questions here to be substantial because there was no evidence to establish the existence of probable cause of the commission of a crime to justify a search

of the premises, the arrest of the Petitioner and the seizure of the whiskey found at the premises; also, that the Petitioner was denied a fair trial by reason of the Court's failure to require that the identity of the Informer be disclosed by the Government.

The Opinion of the Court of Appeals, (Tr. 43), (Appendix A-2), recites the facts of this case are controlled by *Moore v. United States, 5 Cir., 1961, 296 F 2d 519,* and *United States v Potts, 6 Cir., 1961, 297 F 2d 68.* Petitioner submits this conclusion is incorrect.

In the cited Moore v. United States, the Officers were three or four blocks from the place where the arrest occurred when notified of the theft of mail sacks. Four individuals were observed, one of whom threw something down. Three ran. When one was approached he was observed attempting to conceal a brown envelope of the type used by the Government.

In the cited United States v. Potts, the Government Agents had prior information and on several prior occasions gone out to the rural community and on February 10, 1959, at the premises where the Defendant was arrested on February 16, 1959, saw men loading from a car what appeared to be quantities of sugar and containers, both commonly used in the unlawful liquor business into a smokehouse adjacent to what appeared to be an unoccupied dwelling. On the 16th of February, 1959, the Officers returned to the community, went upon the same premises and saw Appellant and others unloading what resembled sacks of sugar and meal into the smokehouse, heard the flow of liquid therein and heard men talking about whiskey.

Probable cause for the arrest of the accused in both cases had in fact and law adequate basis. The facts in the instant case are decidedly different. The searches and seizures were incident to the lawful arrests in the cited cases.

In the instant case the arrest of the Petitioner occurred after the Officers found the whiskey, (Tr. 14). Officer Sparks, after forcing his way into the building, said "Then I saw it was Willie Wiggs and placed him under arrest". There is no basis for a finding that this search was an incident to an arrest, lawful or otherwise. This construction is contrary to the holding in *Johnson v. United States, 92 L. ed 436, 68 S. Ct. 367, 333 U. S. 10,* as here, because in the Johnson case the arrest was made after the contraband had been found inside the room and the seizure was based on observation of the contraband and not information furnished by an Informer. Probable cause came into existence only after the search began and the arrest was an incident of the search.

The instant search came about only as a result of data furnished by a confidential Informer, (Tr. 20), and this witness, Mr. Sparks, an agent of the Alcohol and Tobacco Tax Unit would not state this Informer was a reliable informer and expressly limited his testimony to the effect this Informer was only a confidential Informer, (Tr. 22).

The case of *Contee v. United States, 215 F (2d) 324* is to the effect probable cause cannot arise solely on the statement of a confidential Informer whose reliability has not been shown.

As to the failure to furnish the identity of the confidential Informer, it is urged the Court's ruling in the instant case is contrary to the doctrine in *Rovairo v. U. S., 1 L ed 2d 639, 77 S. Ct. 623, 353 U. S. 53* and *Costello v. U. S., 298 F 2d 99.*

The Government should have been required to disclose the identity of the Informant since the evidence apart from this was non-existent or insufficient.

CONCLUSION

For the foregoing reasons, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

A. K. BLACK,
Counsel for Petitioner
P. O. Box 527
101 East Madison Street
Lake City, Florida

CERTIFICATE OF SERVICE

I, A. K. BLACK, counsel for Petitioner, certify that four copies of the foregoing Petition for Writ of Certiorari were mailed this 29th day of August, 1962, air mail, postage prepaid, to the Solicitor General, Justice Department, Washington, D. C., and do also certify four copies thereof were mailed this 29th day of August, 1962, postage prepaid, to Honorable Clinton Ashmore, United States Attorney, Post Office Building, Tallahassee, Florida.

Counsel for Petitioner

APPENDIX A-1

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 1961

No. 19,473

D. C. Docket No. 5529 Pensacola Criminal

WILLIE AMOS WIGGS,
Appellant,

versus

UNITED STATES OF AMERICA,
Appellee.

Appeal from the United States District Court for the Northern District of Florida.

Before Tuttle, Chief Judge, Bell, Circuit Judge, and Carswell, District Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Florida, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

Issued:

June 29, 1962

APPENDIX A-2

In The

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 19,473

WILLIE AMOS WIGGS,

Appellant,

versus

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court for the Northern District of Florida.

(June 29, 1962)

Before TUTTLE, Chief Judge, BELL, Circuit Judge and CARSWELL, District Judge.

PER CURIAM: This appeal is controlled by the principle, here fully sustained by the facts, that where there is probable cause for the arrest, the search incident thereto is, and was in this instance valid. Cf. *Moore v. United States*, 5 Cir., 1961, 296 F. 2d 519; *United States v. Potts*, 6 Cir., 1961, 297 F. 2d 68.

This being so, the judgment of conviction is

AFFIRMED.

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(Seal)

A true copy
Test: EDWARD W. WADSWORTH
Clerk, U. S. Court of Appeals,
Fifth Circuit
By Gilber F. Ganuchian
Deputy
New Orleans, Louisiana

APPENDIX A-3

[533] – Bell

Filed Fourth day of August, 1962
Edward W. Wadsworth
Clerk of the United States Court of Appeals

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 19,473

WILLIE AMOS WIGGS,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court for the Northern District of Florida.

(ON PETITION FOR REHEARING (August 2, 1962)
Before TUTTLE, Chief Judge, BELL, Circuit Judge and GARSWELL, District Judge.

PER CURIAM:

It is ORDERED that the petition for rehearing in the above entitled and numbered cause be, and the same is, hereby DENIED.

ORDER DENYING PETITION FOR REHEARING
Filed – August 2, 1962

BRIEF FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 390

WILLIE AMOS WIGGS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 12–13; R. 43) is reported at 304 F. 2d 876.

JURISDICTION

The judgment of the court of appeals was entered on June 29, 1962 (R. 44). A petition for rehearing was denied on August 2, 1962 (R. 48). The petition for a writ of certiorari was filed on August 30, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the search and seizure was made incident to an arrest based upon probable cause.

2. Whether petitioner was entitled to the name of a confidential informant where there was no showing that the informant had participated in the crime.

STATEMENT

Petitioner was indicted in the Northern District of Florida in two counts charging violations of the revenue laws by the possession and concealment of distilled spirits which lacked evidence that a tax had been paid or determined (R. 2). He was found guilty by the court (a jury having been waived) and was sentenced to imprisonment for concurrent terms of eighteen months on each count (R. 5, 30, 33, 36).

The evidence adduced at the hearing on a motion to suppress (which was also considered on the issue of guilt (R. 6, 29)) may be summarized as follows:

George S. Sparks, a federal investigator with the Alcohol and Tobacco Tax Division of the Internal Revenue Service, received information from a confidential informer that petitioner, Willie Wiggs, was loading some whiskey from a small out-building at a certain location (R. 16). Sparks, a deputy sheriff, and Jerry A. Alford, Florida State Beverage enforcement agent, concealed themselves in the immediate vicinity (R. 16, 11). Agent Alford had known petitioner for five or six years and had personal knowledge of petitioner's reputation for dealing in "moonshine" whiskey (R. 12, 15). Agent Sparks also knew of petitioner's reputation (R. 18).[1]

[1] Petitioner took the stand and admitted he had previously been arrested for "moonshine" whiskey (R. 27) and for "bootlegging" (R. 28).

At about 8:20 p.m., two colored men (one tall and slender and the other short and stocky) walked past them. Each carried a five-gallon empty jug and went to the out-building (R. 12–13, 16, 19).[2] When Alford and Sparks moved closer to the out-building (R. 16–17), they saw the shorter man search for keys, unlock the door of the building and step inside. The man who was outside handed a jug through the door (R. 16–17, 13). At that point the officers rushed to the building (R. 13, 17). Sparks testified that he thought he could "bottle up" both men, but the tall, slender man ran and escaped (R. 17, 20). Petitioner was in the doorway of the building when the officers arrived (R. 13), trying to hold the door shut with one hand while holding a jug in the other hand (R. 17). Sparks forced his way in and told him they were officers. Petitioner offered no resistance (R. 17). Sparks testified (R. 17): "Then I saw it was Willie Wiggs and placed him under arrest and searched him and found two rings of keys".

The officers searched the building and found two hundred and fifteen gallons of whiskey, many five-gallon jugs, two kegs, and a copper condenser of the type usually used in a still (R. 14, 17). The small out-building or shed was approximately 10 by 12 feet, had no windows, was open on two sides, and was 12 to 15 feet from the nearest house (R. 18). It was

[2] Agent Alford, asked whether he recognized either of the men, stated (R. 13): "I could determine from the bulk of him he looked like Willie Wiggs when he went past but the other subject I didn't know."

stipulated that petitioner rented the building (R. 23).[3]

Sparks testified that he did not attempt to secure a search warrant because all he had was the information from the informant (R. 24–25), but that "* * * we believed that a violation was being committed in our presence. * * * And the fact we saw the information unfold as the informer as [sic] stated".

ARGUMENT

1. Petitioner contends that the seizure of whiskey from the shed was illegal because it was made without a search warrant and was not incident to a valid arrest. The premise of this argument is the assumption that the search and seizure preceded the arrest (Pet. 7, 9). This, however, is refuted by the record.

Sparks, who arrested petitioner, did not testify that he searched the premises prior to the arrest. On the contrary, his testimony was that as soon as he was close enough to petitioner to verify his identity and thus corroborate his previous confidential information, he immediately arrested petitioner. That Sparks intended to arrest immediately is shown by his testimony that he hoped to arrest both participants (R. 20).

Petitioner seeks to read too much into one question and answer by agent Alford. He was asked (R. 14):

> Q. All right, then what did you do after you found this stash of whiskey?
>
> A. Investigator Sparks arrested Willie and on search of his person took several rings of

[3] There is no showing that petitioner had any interest in the nearby home (R. 18).

> keys out of his pocket and gave the keys to me and then I took the lock that had been unlocked on the outside and searched through the keys until I found the key that fit the lock from the same keys that were taken off of Willie. Then we destroyed the whiskey.

Petitioner apparently reads this to mean that the search took place first. We suggest, however, that Alford was recapitulating—telling of the arrest by Sparks to explain his (Alford's) activities. This interpretation is consistent with the testimony of Sparks.

The officers had probable cause for the arrest.[4] The information given by the informer was verified by the location of the building, by observation of the passing of the five-gallon jug and by the flight of the other participant. Surely, the circumstances warranted a prudent man in believing that an offense was being committed then and there. *Draper* v. *United States,* 358 U.S. 307. Finally, the valid arrest supported the incidental search of the small shed. *Agnello* v. *United States,* 269 U.S. 20, 30; *United States* v. *Rabinowitz,* 339 U.S. 56, 60.

2. Petitioner's motion to suppress stated, *inter alia,* that the search was illegal because the alleged confidential information was a fiction created by the officers (R. 4). During cross examination of Investigator Sparks, petitioner's counsel asked Sparks to

[4] State law, as well as federal, permits arrest without a warrant. Section 901.15(3) of the Florida Statutes provides for an arrest without a warrant when the officer has reasonable ground to believe that a felony had been or was being committed. This was a "dry" county (R. 28).

name the confidential informer, but the court sustained the government's objection (R. 21).

Petitioner contends that this was error under *Roviaro* v. *United States,* 353 U.S. 53. The *Roviaro* case, however, related to an informant who was a participant in the criminal activities and could testify as to the criminal transactions charged. Here, the informant was not present at the time of the offense which formed the basis of the prosecution. In fact, the agent testified that he could not be sure that the informant was reliable (R. 22). Moreover, he did not attempt to arrest petitioner until the information had been verified by personal observation. There was thus no reason to disclose the name of the informant.[5] *Scher* v. *United States,* 305 U.S. 251; *United States* v. *Li Fat Tong,* 152 F. 2d 650, 652 (C.A. 2). As this Court stated in *Scher* v. *United States,* 305 U.S. at p. 254:

> In the circumstances the source of the information which caused him to be observed was unimportant to petitioner's defense. The legality of the officers' action does not depend upon the credibility of something told but upon what they saw and heard—what took place in their presence. * * *

[5] Petitioner did not present any affirmative defense. His only testimony related to his prior arrests.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.
HERBERT J. MILLER, JR.,
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BEATRICE ROSENBERG,
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Attorneys.

SEPTEMBER 1962.